

In the Matter of)
)
A National Broadband Plan for Our Future) GN Docket No. 09-51

The Internet does not currently recognize or enforce these standard rules of commerce, and so its commercial potential has not been realized -- and never will be until these deficiencies are addressed. Sources like the International Federation of Phonographic Industries (IFPI)¹ suggest that songs downloaded illegally may outnumber songs downloaded legally by a factor of some 20 to one worldwide.² Network experts have indicated that up to 70% of the volume of traffic on broadband networks is Peer-to-Peer, or P2P traffic relating to only 5% of the users – and easily 90% of such traffic is unlawful.³

Unfortunately, the proponents of many “Net Neutrality” principles simply ask for more of the same Internet, with perhaps even greater restrictions on the ability of network operators and users of the network to enforce the standard rules of commerce. The looting of copyrighted material is rampant. Indeed, the current security of the transmission of copyrighted material via broadband networks is worse than a train or stagecoach traveling through the most lawless portion of the old Wild West. The opposition to technologies that identify and discourage theft and looting is a principal tenet of many Network Neutrality proposals. For example, H.R. 5417 from the 109th Congress makes it an antitrust violation to fail to provide broadband network services on reasonable and nondiscriminatory terms and conditions, or to block, impair, or discriminate against, or interfere with the ability of any person to use a broadband network. While an exception exists for measures to manage the functioning of the network, to protect the security of such network, and to prevent violations of law, these measures themselves must be “reasonable and nondiscriminatory.” The exception is far from clear, particularly in the area of actions taken to prevent copyright violations. When such an ambiguity exists, the likelihood that companies will spend money to develop technologies to deter broadband piracy falls precipitously. New anti-piracy technology could well be discouraged. Even if the exceptions in H.R. 5417 were determined to permit ISPs to *discourage illegal* copyright practices, the bill clearly would not allow ISPs to *encourage* their customers to patronize sites that adopt *lawful* copyright practices.

If the FCC allows similar network neutrality concepts to prevail, then the Commission’s laudable economic goals will never be accomplished. If songwriters continue to be decimated by copyright piracy, and if the movie and television industry is the next victim, then lawlessness will have been victorious and this Commission will have presided over **economic decline**, not economic growth.

¹ IFPI represents the recording industry worldwide, with a membership comprising some 1400 record companies in 72 countries and affiliated industry associations in 44 countries. IFPI’s mission is to promote the value of recorded music, safeguard the rights of record producers and expand the commercial uses of recorded music in all markets where its members operate.

² The Recording Industry 2006 Piracy Report: Protecting Creativity in Music, (International Federation of the Phonographic Industry, London, United Kingdom: July 2006) www.ifpi.org/content/library/piracy-report2006.pdf Accessed June 8, 2009.

³ See Comments of NBC Universal, Inc., *In the Matter of Broadband Industry Practices*, FCC WC Docket No. 07-52, Feb. 13, 2008 at 2 (citing various sources).

The digital commerce at stake here is significant. According to a recent International Intellectual Property Alliance report⁴ the core copyright industries:

- Accounted for nearly 23 percent of the U.S. economy's growth in 2006-2007;
- Grew at a rate more than twice that of the U.S. economy as a whole in each of the years 2004-2007;
- Added \$899 billion to the U.S. economy in 2007 – approximately 6.4 percent of GDP;
- Exceeded \$126 billion in foreign sales in 2007;
- Employed 5.6 million workers in 2007, more than 4 percent of the U.S. workforce.

Clearly, the copyright industry is not negligible and not one that should be exposed to preventable theft and looting.

(b) Proper Incentives for Private Sector Investment. Government money is important but alone is not sufficient to develop the desired infrastructure. In order to encourage the private sector to invest, it must have proper incentives to be able to manage its investment. The President's and the FCC's goals will not be reached without investment from the private sector. However, such essential investment will be deterred if there is excessive regulation on the terms and conditions upon which they may manage the networks crucial to the success of the National Broadband Plan.

The economic interests of those who would impose "Net Neutrality" regulation on further deployment of the National Broadband Network are contrary to the interests of creators. But most importantly they are also contrary to the goals of the President, Congress and the FCC. If the FCC wants investments to be made by people who are capable of building and running networks, the Commission cannot exclude the private sector. The proposed network management regulations would do just that.

If the FCC wants to make broadband access affordable, then the network operators must be allowed to engage in reasonable network management. For example, without reasonable network management, the small number of users of inordinate amounts of bandwidth could not be held accountable for monopolizing access in certain areas. To ensure equal access to all, as the FCC wishes to do, network providers would be forced to provide higher bandwidth than otherwise necessary to accommodate a few abusive users. This would clearly drive up the costs for users. In addition, this very same small percentage of users is among the most egregious offenders of copyrighted content on the Internet. The adverse consequences of imposition of many of the Network Neutrality principles would likely be significant, all to the detriment of the Commission's broadband access goals.

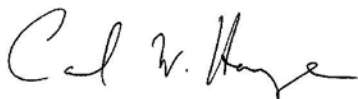
⁴ The complete report can be viewed at www.iipa.com.

(c) Job Creation. In order for a robust broadband network to be an engine for job creation, those investing in the network, as well as those using the network, must be able to see an economic future where they will receive a healthy return on their investment. Excessive restrictions on the rules under which the network may operate always retard investor enthusiasm and could limit investment in the technological features that network operators would prefer to make available to users if the regulatory regime were less onerous.

Unfortunately, many Network Neutrality proposals constitute precisely this sort of onerous regulation and would discourage just this sort of robust investment. For example, regulations restricting the ability of ISPs to manage their networks would discourage the development of technologies that can identify and address unlawful content transmitted over the internet. Such restrictive regulations would eliminate the last bit of hope that songwriters have to survive the digital looting of our creations. More broadly, it would reduce rather encourage the creation of jobs in content creation, which the IIPA survey quoted previously demonstrates a robust engine of economic growth in the United States.

We therefore urge the FCC to proceed with extreme caution when asked to impose “Network Neutrality” regulatory requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Carl W. Hampe". The signature is fluid and cursive, with the first name "Carl" being the most prominent.

Carl W. Hampe

Counsel for the Songwriters Guild of America

Baker & McKenzie LLP
815 Connecticut Ave., NW
Suite 1200
Washington, D.C. 20006
Tel: (202) 835 4259
Fax: 202 416 6979